117 (3)

No. 08-649

Supreme Court, U.S.
FILED
JAN 16 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CHARLES E. BAKER,

Petitioner,

v.

CANADIAN NATIONAL/ILLINOIS CENTRAL RAILROAD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a compelling reason exists to justify certiorari where the Petition fails to identify any conflict among the circuits or with a decision of a state court of last resort and where the circuit court's holding that Baker did not "foul" the tracks, as defined in 49 C.F.R. §214.7, was supported by ample evidence that his work on Illinois Central's right-of-way did not require any worker to be within twenty-five (25) feet of the tracks.

II. Whether a compelling reason exists to grant certiorari to review the jury's factual finding that Baker's work did not require him to "foul" the tracks within the meaning of the Federal Railroad Administration ("FRA") Roadway Worker Protection Regulations, 49 C.F.R. §214.303.

III. Whether a circuit court's interpretation of federal safety regulations adversely to an injured worker, without more, is sufficient to compel certiorari.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Illinois Central Railroad Company is a wholly-owned subsidiary of Illinois Central Corporation. Illinois Central Corporation is a wholly-owned indirect subsidiary of Canadian National Railway Company, which is a publically-owned company traded on the New York and Toronto Stock Exchanges. No single entity owns as much as 10% of the stock of Canadian National.

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INTRODUCTION

Baker has shown no conflicting jurisprudence and no important question of federal law compelling immediate review by this Court of the Fifth Circuit Court of Appeals' fact-specific decision that Baker, while driving across a public railroad grade crossing in the same manner as any other motorist, was not a "roadway worker," as defined in the Roadway Worker Protection Regulations ("RWPR"). 49 C.F.R. §214.7. Even if this Court were to reverse the Fifth Circuit's holding that Baker was not a roadway worker while on the worksite, Baker is still left with the jury's determination that he lost that status once he was traveling on Green's Crossing Road just like any other motorist.

While working on Illinois Central's right-of-way, neither Baker nor his co-workers came within twenty-five feet of the tracks. Consequently, Baker had no potential to "foul the tracks" and he did not meet the definition of "roadway worker." If Baker was not a "roadway worker" while on Illinois Central's right-of-way, he could not become one simply by exiting the worksite onto a public highway. Once Baker left the worksite, he was in the same position and subject to the same laws as any other motorist. Baker's claim to the contrary stretches the RWPR well beyond the language or intent of the regulations.

The Fifth Circuit's decision is not only consistent with the RWPR, it is an application of those regulations to a unique set of facts. While Baker claims

review is necessary to improve worker safety, he has failed to support this argument with any evidence that the Fifth Circuit's decision will adversely impact worker safety. For these reasons, the Petition should be denied.

STATEMENT OF THE CASE

This case arises from a rather routine railroad grade crossing accident in which the jury resolved all relevant fact issues in favor of Illinois Central. The pertinent facts show not only that this case is singularly inappropriate for certiorari, but also that the jury and Fifth Circuit Court of Appeals reached the correct conclusions and properly followed the law.

On the day of the accident, Baker was working as an employee of Hancock Construction, a contractor hired by Illinois Central to remove dirt from an area of land on Illinois Central's right-of-way. Tr. 473-75. The worksite consisted of a roughly rectangular area paralleling the railroad tracks. Adjacent to the north end of the worksite ran a public thoroughfare known as Green's Crossing Road. At the intersection of Green's Crossing Road and Illinois Central's tracks was a public grade crossing. The undisputed evidence showed that neither Baker nor any other worker came within twenty-five feet of the near rail of the railroad tracks while on Illinois Central's right-of-way. Tr. 475-77, 490-92.

The railroad crossing had a visibility to the south of at least 2,000 feet and was equipped with standard stop signs and crossbuck signs. Tr. 210-20, 478-86, 503-505, 537-38, 572-73. The turnout from the worksite onto Green's Crossing Road was slightly less than 86 feet from the railroad tracks, Tr. 569, and Baker's truck was approximately 50 feet long, Tr. 254. Baker's co-worker Kenneth Henderson, who drove a truck with the same dimensions as Baker's truck, testified that he was able to pull his truck off the worksite, onto Green's Crossing Road, and straighten the cab of his truck at the stop sign such that he could see down the tracks like any other eastbound motorist. Tr. 512-15, 525. Three eye-witnesses testified that, in fact, Baker's truck was straight and perpendicular to the tracks before Baker ran the stop sign and drove in front of the approaching train. Tr. 219-20, 482-85, 490-92, 551. According to these witnesses, Baker approached the crossing just as any other motorist and had the same opportunity to observe the crossing and approaching trains. *Id.* Unfortunately, and undisputed in the record, Baker ran the stop sign without stopping, looking or listening for approaching trains, while the train was sounding its horn and plainly visible. Tr. 210, 215, 220. Based upon these facts, the jury correctly found that Baker's own negligence was the sole cause of the collision.

Under the RWPR, a railroad is required to provide "on-track safety" to "roadway workers." To be a road worker, the employee must, among other things, be "on or near track or with the potential of

following a track." 49 C.F.R. §214.7. "Following a track" is defined as:

> The placement of an individual or an item of equipment in such proximity to a track where the individual equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field site of the near running rail. *Id.*

The trial court's instruction to the jury on the plaintiff's RWPR claim specifically quoted the definition of "following the track" stated in 49 C.F.R. §214.7. Tr. 655. The trial court further instructed the jury that the RWPR did not apply once Baker had "left the worksite and was traveling on a public highway and approaching a public railroad crossing, with the same opportunity as other motorists to see and comprehend the crossing." Tr. 654-57. On a special verdict form, the jury answered both "No" to the question of whether Baker's work required him to "foul the track" as explained in the court's instructions.

On appeal, the circuit court took a slightly different approach but reached the same conclusion. *Baker v. Canadian Nat'l/Ill. Cent. R.R.*, 536 F.3d 357 (5th Cir. 2008). After noting that the jury specifically found that Baker's work did not require him to "foul the tracks," *Baker*, 536 F.3d at 362, the circuit court held that because Baker's work on Illinois Central's right-of-way did not place him any nearer than "twenty to thirty feet from the closest rail," "Baker did not, as a matter of law, have the potential to follow the track, nor was he on or near the track." *Id.*,

at 365. Therefore, Baker was never a "roadway worker" and the protections specified in the RWPR were not required. *Id.*

Baker's statement of the case contains several factual inaccuracies that should be noted. Like the Fifth Circuit, Baker states that the "work site was twenty to thirty feet from the closest rail." In fact, the evidence showed that no worker came less than twenty-five feet from the nearest rail. Tr. 475-77, 490-92. Baker states that the last wheels of his trailer "were still on or had barely cleared the work site." In fact, the train engineer testified that Baker's truck was "squared up with the railroad tracks" and "all in his lane." Tr. 551. Three of Baker's co-workers who witnessed the accident testified that Baker's truck was straight when it reached the stop sign and that Baker had the same view as any other eastbound motorist. Tr. 219-20, 482-85, 490-92, 551. The Petition also states that "not all the sight obstructions had been removed." However, ample evidence was introduced to show that Baker had an unobstructed view to the south of over 2,000 feet. Tr. 478-86. Finally, Baker states as fact that Illinois Central was acquired by "Canadian National" on July 1, 1999, and that "Canadian National requires railroad worker protections whenever work would occur within 25 feet of the rail." In fact, Canadian National Railway has never been a party to this lawsuit and the trial court properly excluded evidence of Canadian National's

policies.[1] Supp. Tr. 381-82. In compliance with 49 C.F.R. §214.303, Illinois Central had its own "On Track Safety Rules," which meet the requirements of the RWPR. Tr. 566, 577-78. Illinois Central's risk mitigation officer, H.J. Freeman, Jr., testified that under Illinois Central's policy, a flagman was not required because Baker did not work within four feet of the tracks and did not have the potential to foul the tracks. *Id.*

The eye-witnesses agreed Baker was looking back over his shoulder at his co-workers when he ran the stop sign and never looked for approaching trains, while the train was plainly visible, sounding its horn, and travelling within the FRA speed limit. Tr. 210, 215, 220, 484-87, 536-38, 545, 547, 549, 553.

REASONS FOR DENYING THE PETITION

For several rather obvious reasons the Court should deny Baker's Petition.

[1] Baker's complaint referred to the defendant as "Canadian National/Illinois Central Railroad," a name by which Illinois Central previously did business. Prior to trial, this moniker was corrected and the case went to trial solely against Illinois Central. Illinois Central and Canadian National Railway are separate corporations. Supp. Tr. 381-82.

A. No Conflicting Jurisprudence.

Baker has not identified any conflicting decision of this Court, the circuit courts of appeals, or any state appellate court of last resort. To the best of Illinois Central's knowledge, the decisions of the Circuit Court and District Court below are the only published decisions to address whether merely traversing a public railroad grade crossing constitutes "fouling the tracks" under the RWPR. By its nature, lower court decisions are limited to the specific facts of this case. Consequently, whether other courts will agree or disagree with the Circuit Court's decision, or whether similar cases will even be litigated, is entirely speculative. Certiorari should be denied unless and until a significant conflict in the decisional law arises. Sup. Ct. R. 10(a); *see Rogers v. United States*, 522 U.S. 252 (1998) (writ of certiorari dismissed where conflict among courts did not exist).

B. Absence of a Sufficiently Important Question of Federal Law.

With no obvious justification for certiorari, Baker argues that the Fifth Circuit decision has "significantly increased the possibility that other persons doing construction or maintenance work for railroads or their contractors will be injured or killed." Cert. Pet., at 9-10. Citing statistics on fatalities and injuries among roadway workers since the adoption of the RWPR in 1997, *id.*, at 10-12, Baker argues that certiorari should be granted in order to reduce the

risk of injury which, Baker contends, was created by the Fifth Circuit decision.

Baker's "worker safety" argument is entirely speculative and insufficient to justify certiorari. Nowhere has Baker submitted any evidence that the Fifth Circuit decision will reduce the effectiveness of the RWPR. The statistics cited by Baker are not categorized by incident type, equipment involved, or any other distinguishing factor. Consequently, the Petition fails to show a factual nexus between the statistics cited and the instant case. Moreover, the most recent publication cited by Baker – *Railroad Workplace Safety: Adjacent-Track On-Track Safety for Roadway Workers, Notice of Proposed Rulemaking,* 73 Fed. Reg. 41214 (Jul. 17, 2008), was published only one day after the Fifth Circuit entered judgment for Illinois Central in this case. Thus, these statistics cannot possibly show an impact of the Fifth Circuit's decision on roadway worker safety.

Without doubt, the RWPR was adopted by the FRA for the laudable purpose of reducing the risk of injury and death to railroad roadway workers. Merely because the regulations concern worker safety, however, does not mean that a decision denying a plaintiff relief under those regulations is sufficiently important to justify certiorari. If this were so, then any time a circuit court of appeals interpreted federal safety regulations in favor of a defendant, then certiorari would be appropriate.

Baker further argues that the FRA has recognized that the RWPR "need to be strengthened, not weakened, in order to 'reduce further the risk of serious injury or death to roadway workers.'" Cert. Pet., at 11. The problem with this argument is that, on its face, it recognizes that the decision of whether to further strengthen these regulations is currently before the FRA. If Baker is correct and the RWPR do need strengthening, then the FRA is well-suited to make this decision. Moreover, this argument presumes Baker was a "roadway worker" – a fact resolved adversely to Baker by the jury.

More pertinent to this case, the jury expressly found as a matter of fact that Baker was not due the protections provided under the RWPR and was provided all the protections due under state statutory and common law. These protections included required railroad crossbuck signs, Miss. Code Ann. §77-9-247; stop signs, Miss. Code Ann. §63-3-1009; the locomotive horn and bell sounded for over 900 feet, Miss. Code Ann. §77-9-225; and an unrestricted view of over 2,000 feet. Baker's argument that certiorari is required to protect worker safety is ironic given that the jury found his own unsafe conduct to be the sole cause of the accident.

Neither the statistics cited by Baker nor the facts of this case reveal a sufficiently important question of federal law to justify certiorari. Sup. Ct. R. 10(c).

C. Propriety of the Decision Below.

The Fifth Circuit's decision was proper and consistent with the RWPR. The Court properly recognized that "fouling the tracks . . . means the placement of an individual . . . in such proximity to a track that the individual . . . could be struck by a moving train or on-track equipment, or in any case within four feet of the field side of the near running rail." 49 C.F.R. §214.7. The Court properly recognized that there was no evidence that Baker's work required him to be less than "twenty to thirty" feet from the tracks. In fact, the undisputed evidence showed that at no time was any worker less than twenty-five feet from the nearest rail of the track. Tr. 447. Baker introduced no evidence that he was struck, or in danger of being struck, by a train while on Illinois Central's right-of-way. Rather, he was struck while driving on a public street with the same opportunity to see and hear the approaching train as any other motorist. Consequently, Baker was not a "roadway worker" while on Illinois Central's right-of-way. The Fifth Circuit did not reach the issue of whether he became a roadway worker by driving on to the public road but noted that the jury found against Baker on this issue. *Baker*, 536 F.3d at 363.

The Advisory Committee's comments establish that the RWPR was promulgated for limited purposes and based on specific accident data:

> The Advisory Committee purposely chose not to address all conceivable hazards, but studied available data regarding safety issues

> and selected those circumstances presenting the greatest risk to roadway workers.

61 Fed. Reg. 65959, 65961 (Dec. 16, 1996). The comments make clear that "FRA believes that adequate voluntary measures are being taken to protect roadway workers at highway-rail crossings." "The accident data studied does not provide information regarding this type of hazard." *Id.* If the FRA intended the RWPR to apply to the ordinary use of public grade crossings by railroad employees, it would have said so in the regulations or comments.

Under Baker's interpretation of the RWPR, a railroad worker would be entitled to on-track safety whenever his duties require him or her to traverse a railroad grade crossing in the performance of his or her duties. The fallacy of this argument is illustrated by the facts of this case. When Baker left the worksite, he had the option to turn right toward the railroad crossing or left away from the railroad crossing. Had he chosen to turn left, he had the option of driving to the next railroad crossing or elsewhere to cross the railroad tracks. Under Baker's interpretation, he would be entitled to flag protection anywhere he chose to traverse a public railroad crossing regardless of the type of warning devices at the crossing. But the RWPR was not intended to address "all conceivable hazards" and the FRA chose not to address "roadway workers at highway-rail crossings." *Id.*

Baker argues that because the RWPR defines "adjacent tracks" as "two or more tracks with track

centers spaced less than twenty-five feet apart," then the phrase "on or near track" in the definition of "fouling the track" must mean anything less than twenty-five feet. This argument is unavailing for three reasons. First, it cannot be found in the language of the regulations. Second, neither Baker nor his co-workers ever came within twenty-five feet of the nearest rail while on Illinois Central's property. Third, Baker was not working between two or more tracks. Consequently, the Fifth Circuit correctly determined that as a matter of law Baker was not a roadway worker.

D. Certiorari Is Inappropriate to Address Asserted Factual Errors or the Misapplication of Law to Fact.

In reality, Baker is unhappy with the jury's factual finding that his work did not require him to "foul the track" and the Fifth Circuit's application of the RWPR to the evidence introduced at trial. However, a petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *NLRB v. Hendricks Co. Rural Elec. Corp.*, 454 U.S. 170 (1981); *Rudolph v. United States*, 370 U.S. 269 (1962).

Quoting the regulations verbatim, the trial court instructed the jury –

> "Fouling a track" is defined as "the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case within four feet of the field side of the near running rail."

The trial court further instructed the jury that –

> When a roadway worker such as the plaintiff has left the work site and is traveling on a public highway and approaching a public railroad crossing, with the same opportunity as other motorists to see and comprehend a crossing, he is at that point treated as any other member of the motoring public and is no longer in need of the special protections afforded to him in his capacity as a roadway worker.

Tr. 654-57. The jury then found, based on the evidence, that Baker's work did not cause him to "foul the track" within the meaning of the RWPR. *Baker*, 536 F.3d at 363.

Baker now attempts to convert the jury's factual finding – which was not addressed by the Fifth Circuit – into the legal issue of what is meant by the word "near" in 49 C.F.R. §214.7. Unfortunately for Baker, the jury has spoken to this issue and found that the worksite was such that Baker could turn onto the Green's Crossing Road and approach the

railroad crossing just as any other motorist. *Id.* The Fifth Circuit found that while on Illinois Central's right-of-way, as a matter of law, Baker was not close enough to the tracks to be considered "on or near a track or with the potential of fouling a track." *Id.* Even if this Court were to reverse the Fifth Circuit's holding that Baker was not a roadway worker while on the worksite, Baker is still left with the jury's determination that he lost that status once he was traveling on Green's Crossing Road just like any other motorist. *See South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40 (8th Cir. 1988), *cert. denied*, 493 U.S. 1023 (1990) (certiorari denied where Court able to decide case on another ground). Whether another court or jury could disagree with these findings does not alter the fact that the error asserted by Baker is one "of [either] erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Consequently, this case is not suited for certiorari.

CONCLUSION

The RWPR were not created to address every conceivable hazard to railroad roadway workers and the FRA expressly chose not to address the risks roadway workers face at public grade crossings. Baker has failed to show any conflicting decision of a federal or state court and has failed to show why the issue presented is sufficiently important to justify certiorari. Contrary to Baker's assertion, the Fifth

Circuit's decision does not severely reduce the protections offered by the RWPR. Rather, the Fifth Circuit has simply applied those regulations to a unique set of facts in this particular case. According to every eyewitness, and as determined by the jury, Baker was struck by a train solely because he ran the crossbuck and stop signs, failed to yield the right-of-way, and failed to look or listen for the approaching train. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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